

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

CASE NO. 05-15337-3P7

ALMA JEANNE SLIZYK,

Debtor.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This Case is before the Court upon Alma Jeanne Slizyk's Objection to Claim One (1) filed by Steven A. Smilack. After a hearing held on April 24, 2006, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 15, 2005, Alma Jeanne Slizyk (Debtor) filed a petition for relief under Chapter 7 of the Bankruptcy Code.

2. Debtor and Steven Smilack (Creditor) are former husband and wife. Although, the parties were divorced on June 1, 1998, they continue to fight one another in various venues of the court system in the State of Florida.

3. On December 2, 2005, Creditor filed a Proof of Claim in the amount of approximately \$290,000. D. Ex. 1. Claim One (1) states the debt was incurred on March 24, 2005 and February 24, 2003. D. Ex. 1. Attached to the proof of claim is a judgment, dated March 24, 2005, in the amount of \$62,072.98 and a judgment, dated February 24, 2003, in the amount of \$542,281. D. Ex. 1.

4. On January 30, 2006, Debtor filed an objection to Claim One (1). Debtor alleged in her objection that Creditor failed to file adequate documentation in support of his claim. On February 2, 2006, Creditor filed a response to Debtor's Objection to Claim One (1). Creditor's response did not provide further documentation as to how the amount of Claim One (1) was reached, nor did the response allude to the fact that the claim amount included interest and attorney's fees and costs.

5. On June 1, 1998, the Seventh Judicial Circuit Court, in Volusia County, Florida, executed a "Final Judgment of Dissolution of Marriage" which stated that Debtor was to pay Creditor approximately \$10,000. On March 4, 2005, the circuit court executed a subsequent order increasing the amount of the judgment to \$62,072.68. D. Ex. 4.

6. On June 9, 1998, Creditor filed a foreclosure proceeding against Debtor in the Fifteenth, Judicial Circuit Court in Palm Beach County, Florida. The property at issue in the foreclosure proceeding, is located at, 156 Harbor Circle, Delray Beach, Florida ("Delray Beach Property").

7. On April 18, 2000, the court in the foreclosure action entered a "Final Judgment of Foreclosure" against Debtor and in favor of Creditor. C. Ex. 7. On February 24, 2003, the court in the foreclosure action amended the "Final Judgment of Foreclosure," to increase the amount of the final judgment to \$542,281.

8. On July 28, 2003, the Delray Beach Property was sold at a Clerk's Sale to the Creditor for \$550,000. However, Creditor subsequently had the sale set aside. During the time Creditor had the sale set aside, the Debtor was in Oregon, caring for her daughter who had undergone brain surgery.

9. On September 9, 2003, another Clerk's Sale was held and Creditor repurchased the Delray Beach Property for the significantly lower purchase price of \$425,000. C. Ex. 5.

10. On November 12, 2003, Debtor filed a "Motion to Set Aside Foreclosure Sale and Certificate of Title." Debtor also filed a "Notice of Lis Pendens" on the property. C. Ex. 5.

11. On September 12, 2005, the circuit court entered an order "Denying Defendant's Motion to Set Aside Foreclosure Sale and Certificate of Title." C. Ex. 5. The circuit court ruled that the purchase price Mr. Smilack paid for the property was not *grossly inadequate*. C. Ex. 5.

12. After acquiring the property, Creditor filed a "Motion for Deficiency Judgment" in the foreclosure proceeding. Prior to the court in the foreclosure proceeding hearing Creditor's "Motion for Deficiency Judgment," Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code.

13. On November 11, 2005, Creditor filed a Motion for Relief From Stay, in an attempt to be able

to pursue a deficiency judgment in the foreclosure action on the Delray Beach Property.

14. On December 22, 2005, the Bankruptcy Court granted Creditor's Relief From Stay Motion. C. Ex. 4. However, Creditor was still unable to obtain a deficiency judgment against Debtor, as the relief from stay order precluded Creditor from seeking an in personam judgment against the Debtor.

15. Although Debtor appealed the March 24, 2005, "Final Judgment of Dissolution of Marriage," Debtor never posted a supersedeas bond or obtained a stay.

16. On May, 17, 2005, the Circuit Court for the Seventh Judicial Circuit, in Volusia County, issued an order denying Creditor's motion to impose a lien upon Debtor's property located at 516 North Riverside Drive, New Smyrna Beach, Florida. In reaching this holding the court stated that, "Smilack has not met the burden of proof that the transfer of the Riverside property prior to the filing of the dissolution was to avoid any payment of a debt owed to him or that it was a fraudulent transfer pursuant to F.S. 56.29." D. Ex. 11. Creditor has appealed this ruling to the Fifth Circuit Court of Appeals, where it is currently pending.

17. With the exception of the March 24, 2005, "Final Judgment of Dissolution of Marriage," Creditor's Proof of Claim failed to provide sufficient documentation as to how the claim amount of \$290,000 was reached.

CONCLUSIONS OF LAW

"A proper Proof of Claim is presumed valid, and as prima facie evidence of the validity of both the claim and its amount." In re Marineland Ocean Resorts, Inc., 242 B.R. 748, 757 (Bankr.M.D.Fla.1999). Unless an interested party objects, a claim is allowed as filed. Once an objection is filed, the objecting party bears the burden of overcoming the presumed validity of the claim with affirmative proof. Id. If the objecting party overcomes the presumed validity of the claim, the claimant must establish the validity and amount of the claim. Id. Thus, the "burden of ultimate persuasion by the preponderance of the evidence rests with the claimant." In re Challa, 186 B.R. 750, 754 (Bankr.M.D.Fla.1995). In the instant case, the Court finds the Debtor presented sufficient evidence at the hearing to overcome the presumed validity of the claim. Therefore, the ultimate burden of proving the validity of Claim One (1) rests with Mr. Smilack.

"A deficiency claim of a secured party may be determined by a Court of competent jurisdiction and if that occurs prior to the commencement of a case such determination would ordinarily have a binding effect upon the parties. If it did not occur it could be determined in the valuation process in the Bankruptcy Court pursuant to Section 506(a) of the Code." In re Costello, 184 B.R. 166, 170-171 (Bankr. M.D. Fla. 1995). Thus, a secured creditor is not required to obtain a deficiency judgment in the non-bankruptcy forum as a pre-requisite for bifurcating a claim into secured and unsecured parts. Id.

On December 2, 2005, Creditor filed a Proof of Claim in the amount of approximately \$290,000. D. Ex. 1. Claim One (1) lists Mr. Smilack as an unsecured creditor. D. Ex. 1. The only documentation attached to Creditor's Proof of Claim are two judgments. The claim contains no reference to the fact that a large portion of the claim is comprised of attorney's fees and costs. The judgments attached to the Proof of Claim include a "Final Judgment of Dissolution of Marriage" dated March 24, 2005, in the amount of \$62,072.98, and a judgment dated February 24, 2003, in the amount of \$542,281. D. Ex. 1.

The February 24, 2003, judgment was entered against the Debtor and in favor of the Creditor in conjunction with a foreclosure proceeding in the Fifteenth Judicial Circuit in Palm Beach County, Florida. The deficiency claim that Creditor asserts is in regards to the February 24, 2003 judgment. On July 28, 2003, the property, located at 156 Harbor Court Circle, Delray Beach, Florida, was sold at a Clerk's Sale to Creditor for \$550,000. However, Creditor subsequently had the sale set aside. At the next sale, which occurred on September 8, 2003, Creditor obtained the property for the significantly lower price of \$425,000. C. Ex. 5. On November 12, 2003, Debtor filed a "Motion to Set Aside Foreclosure Sale and Certificate of Title." C. Ex. 5. Debtor also filed a "Notice of Lis Pendens" on the property. C. Ex. 5. On September 12, 2005, the circuit court entered an order "Denying Defendant's Motion to Set Aside Foreclosure Sale and Certificate of Title." C. Ex. 5. The circuit court ruled that the purchase price Creditor paid for the property was not *grossly inadequate*. C. Ex. 5. After acquiring the property, Creditor filed a "Motion for Deficiency Judgment" in the foreclosure proceeding. Prior to the circuit court hearing Creditor's motion, Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code.

Upon various grounds, the Court finds Creditor is not entitled to a deficiency claim. First, Creditor is listed as an unsecured not secured creditor in Debtor's bankruptcy. 11 U.S.C. § 506(a) clearly deals with the right of *secured* creditors to bifurcate a claim into secured and unsecured parts. Second, even if Creditor had asserted a valid secured claim in Debtor's bankruptcy, he still would not be entitled to a deficiency judgment. Florida courts have held that the amount for which mortgaged property sells at during a properly conducted sale is neither conclusive as to the value of the property nor the right to a deficiency judgment. Gottschamer v. August, Thompson, Sherr, Clark & Shafer, P.C., 438 So.2d 408, 409 (Fla. 2d DCA 1983). Other than showing he purchased the property for \$425,000, Creditor submitted no evidentiary evidence as to the true value of the property. C. Ex. 5. As stated above, the purchase price is not conclusive as to the property's value. Further, it appears that Creditor already obtained one windfall in being able to purchase the property at a significantly lower price than what he originally paid for it at the first Clerk's Sale. Although the circuit court found that the foreclosure price was not *grossly inadequate*, that does not mean the price Creditor paid was adequate or commiserate with the property's fair market value. It is difficult for this Court to believe that the Creditor, who is a very well educated and successful businessman, would have originally purchased the property for \$100,000 over its fair market value. Therefore, it would be inequitable for the Court to enter a judgment ordering the Debtor to cover the *so called* "deficiency." In effect, Creditor is looking for a second windfall at Debtor's expense. Based upon the above, Creditor is not entitled to a deficiency claim. Additionally, Creditor is not entitled to any attorney fees and costs that he may be asserting in connection with the deficiency claim or other court proceedings involving himself and the Debtor, including litigation in the bankruptcy court, unless such costs and fees were specifically provided for in a previous judgment. The Court also notes that Creditor's Proof of Claim was severely deficient and misleading, as it did not reference that the claim amount included attorneys' fees and costs, nor did Creditor ever amend his Proof of Claim to attach such supporting documentation.

Although Creditor was unable to prove the above referenced portions of his claim, the Court finds the portion of the claim relating to the "Final Judgment of Dissolution of Marriage" in the amount of \$62,072.68, plus whatever interest may have accrued at the legal rate, to be valid.

CONCLUSION

Based upon the above, the Court finds Claim One (1) is entitled to be treated as an unsecured claim in the amount of \$62,072.68, plus any accrued interest at the legal rate. The Court will enter a separate order Overruling in Part and Sustaining in Part Debtor's Objection to Claim One (1).

Dated this 28 day of August, 2006 in Jacksonville, Florida.

/s/ George L. Proctor
George L. Proctor
United States Bankruptcy Judge

Copies to:
Debtor
Steven Smilack
Chapter 7 Trustee
United States Trustee